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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. ADAMU TAYE CHAN, Defendant and Appellant.	A122550 (Alameda County Super. Ct. No. 156651)

Defendant Adamu Taye Chan invited an acquaintance, Y.D,. to his home where he allegedly sexually assaulted her. He was convicted by a jury of the following crimes against Y.D. on April 11, 2006: one count of sexual penetration by a foreign object (Pen. Code, § 289, subd. (a)(1)); one count of forcible oral copulation (Pen. Code, § 288a, subd. (c)(2)); three counts of forcible rape (Pen. Code, § 261, subd. (a)(2)); and one count of false imprisonment by violence (Pen. Code, § 236). He was found by the court to have committed a prior strike offense (second degree robbery; Pen. Code, § 211, 212.5, subd. (c)), and to have served a prior prison term for that offense (Pen. Code, § 667.5, subd. (b)). He was sentenced to serve 23 years in prison.

Defendant contends that the judgment must be reversed because: (1) the court erroneously denied his request to have the jury instructed with CALJIC No. 10.65 (defendant's reasonable but mistaken belief as to consent); (2) the court erred in admitting, and failing to instruct on, evidence of rape trauma syndrome; (3) the court improperly allowed witnesses to vouch for the victim's credibility; and (4) errors associated with a Japanese language interpreter deprived him of a fair trial.

We will assume without deciding that the court had a sua sponte duty to furnish a limiting instruction on the syndrome evidence, but conclude that any error in failing to give the instruction was harmless in this case. The other assignments of error lack merit, and we affirm the judgment.

I. BACKGROUND

Y.D. came to the United States from Iwate, Japan in 2005 to study English at a language school in Berkeley, and returned to Japan in June 2006. She made the 20-hour trip from her home in Japan to testify at defendant's 2008 trial, where her testimony was introduced through interpreter Eri Minoura.

Y.D. testified that she met defendant on April 6, 2006, while walking in Berkeley. Y.D. pretended not to understand English because speaking English was difficult for her, but defendant addressed her in Japanese. They talked for about 15 minutes, she got defendant's business card, and gave him her e-mail address. Defendant e-mailed her, asked when they could meet again, and the following e-mails were exchanged. Y.D. wrote, "i enjoyed to meet you. but, i'm not interesting person. i think just stupid person. i hope we meet again!" Defendant wrote, "heard people from Iwate are very smart! let's have coffee and chat. let me know when you!" Y.D. wrote, "i have a lot of free time. but, I have to go temple every weekend. so, i think weekdays better. how about your schedule? see you!" Defendant wrote, "I am in LA right now, but I'll be back on Monday. Why don't we meet on tuesday [April 11, 2006]? Let me know when is good for you. I'll be free all day. Have a good weekend!" Y.D. testified that she had a boyfriend at the time and was not interested in defendant, but thought that he could help her learn English because he spoke Japanese.

Y.D. saw defendant again while walking in Berkeley on April 10, 2006. Defendant was in his car and offered her a ride. She testified at trial that she refused the offer, but told Berkeley Police Officer Jeff Shannon when he was investigating the case that she had accepted a ride home from defendant that day. They arranged to meet the next day at a Berkeley BART station.

Defendant picked her up as planned on the afternoon of April 11, 2006, and drove her to a coffee shop where they talked for one or two hours. When they got back in defendant's car, Y.D. thought he was going to take her home, but he drove around Berkeley for awhile and took her to his house. They went inside and he showed her family photo albums. He tried to kiss her, she said "I don't want to," he apologized, and she said, "I'm going to go home now."

Defendant said that he would take her home, but wanted to show her around the house. When they got to his bedroom upstairs, she turned around to go downstairs, but he grabbed her by the shoulders and pulled her backward. She pushed him away, ran down the stairs, started crying, slipped, and slid part way down the stairs on her bottom. Defendant followed her and blocked her way out of the house.

She told him that she wanted to go home, but he locked the front door, and she testified that "[h]e looked out of the window, which is located on top of the door, and he was checking to see the outside, probably because I was crying really hard." Defendant then said, "Oh, I will take you home," and went to the kitchen to get a key to the door. She tried to leave, but he dashed back to her, wrapped his arm around her head, pushed her down to the floor, touched her in the crotch over her clothes, covered her mouth to muffle her crying, and said, "I'm going to hurt you. I'm going to hurt you."[1] When he said this, she thought he would kill her if she did not let him have sex with her.

[1] Y.D. testified that at some point during this sequence of events defendant said, "I'm sorry" and told her to stand up, but then pushed her down again. Y.D. stated in cross-examination that she could not remember the details of what happened when she ran to the front door trying to leave the house. "[I] came down the stairs," she said, "and he was standing right in front of me. And the next thing was the door. . . . I only remember pieces." In her statement to Officer Shannon, Y.D. said that after defendant blocked her way downstairs, she told him that she wanted to go home, screamed, "[d]on't touch me," and ran to the front door. When defendant stopped her there, she sat down, frightened and crying. Defendant pulled her off the floor, took a handkerchief from his pocket, and covered her mouth. She resisted, but he told her, "I will hurt you," and put her in a headlock.

Defendant pulled her by the hand to his bedroom. After he took off her top and his clothes, she took off her pants and underpants. Y.D. reported to Officer Shannon that defendant tried, but was unable, to take off her jeans, and she thought he was going to hit her so she took them off herself. When she was asked at trial why she removed her pants, she answered, "Well, since it has come this far, I thought no matter how hard I try to run away, I wouldn't be able to run away." Y.D. was next asked, "Had you already told the defendant at that point that you did not want to have sex with him?" She answered, "I had been crying a long time before that and I said I really don't want to do it and I said I want to go home, so I thought he knew it. Even though he may not have understood my—the language, normally if a crying woman, you would think a crying woman wouldn't want to do that. Right?"

Defendant took her to the bed and, while she wept, put his penis in her mouth, then put his fingers in her vagina, and then put his penis in her vagina. He took her by the hand to a bathroom, using force that was not "that strong, like normally one would pull someone's hand," where, as she continued to cry, he again put his penis in her vagina. He took her by the hand back to the bedroom, where, as she continued crying, he again put his penis in her vagina.

Y.D. testified that when defendant was finished, he wiped his penis with a Kleenex, and they got dressed. Y.D. said, "I'm going home," defendant offered her a ride, she declined the offer, and walked home. While she was walking she began calling her friend Masayo Sasaki.

Sasaki, assisted by interpreter Minoura, testified that when she checked her cell phone around 9:00 p.m. on April 11, 2006, after attending a temple service in Burlingame, she found that she had seven missed calls from Y.D. She called Y.D. and Y.D. told her that she had been raped by a man named Adam, with whom she did not have a romantic relationship. Sasaki and her husband went to Y.D.'s home, and took her to San Francisco General Hospital. Sasaki said that Y.D. was normally "a very cheerful person," but was frightened and crying that night.

Officer Shannon was dispatched to see Y.D. at San Francisco General Hospital, and she told him that she had been raped by Adam Chan. Shannon took Y.D. to Highland Hospital, where he obtained statements from Y.D. and Sasaki in the early morning hours of April 12, 2006.

Physician Assistant Jennifer Majarian conducted a SART (Sexual Assault Response Team) examination of Y.D. at Highland Hospital that morning. Y.D. told Majarian that her assailant had grabbed her by the arms, put his hand over her mouth, choked her with his arm around her neck, thrown her on the ground, and picked her up and thrown her over his shoulder. Y.D. said that the assailant had penetrated her with his penis and finger, and forced her to orally copulate him. She said that she did not know whether the assailant had ejaculated in her vagina, but knew that ejaculation had occurred "because he had her clean him up with a piece of tissue paper." Majarian found bruising on the inside of Y.D.'s left arm, consistent with having been grabbed there, and bruising and erythema (redness) of the cervix consistent with forced digital or penile penetration.

On cross-examination, Majarian stated that she found no injury or redness inside Y.D's vagina. She indicted that cervical bruising was uncommon, but acknowledged that such bruising could be consistent with consensual sex. She conceded that, in her report of the examination, she wrote that Y.D. knew her assailant had ejaculated because "she cleaned him with tissue paper," not because "*he had* her clean him with a piece of tissue paper" (italics added) as she had testified.

Berkeley Police Officer Roselyn Jung testified that Y.D. came to the Berkeley Police Department on April 27, 2006, to view a photo lineup and make a recorded telephone call to defendant. Y.D. quickly picked out defendant's picture from the lineup, and placed a "pretext" call to defendant to try to elicit an admission of guilt.

The recorded conversation between Y.D. and defendant lasted about 25 minutes and was conducted in parts in Japanese. Y.D. had to hang up and call back at one point when defendant said that he could not hear her. The recording of the calls was played for the jury, and the Japanese portions were translated for the jury by interpreter Minoura. Defendant did not confess in the calls to raping Y.D.

During deliberations, the jury asked for the transcript of the recorded calls, and a read back of the translation of the following portion of the conversation (questions by Y.D., answers from defendant, italicized words spoken in Japanese):

"Q. *Why*? *Then what shall we do*? *What shall we do*? *Well, that was rape, wasn't it*?

"A. I don't think so.

"Q. *Because I don't want to do it. I didn't want to do it. I was crying really.*

"A. Yeah.

"Q. *Then—hello? I'll tell you this. Normally—hello? If she's crying and if the girl is using a loud voice like that and says something like she wants to go home, having sex with her would be rape. I'm telling you it's rape. Hello?*

"A. *Hai* [a Japanese word the interpreter said could mean "yes," you're right," or "I'm listening"].

"Q. *Isn't it rape? Are you listening?*

"A. *I am.*

"Q. *So its rape.*

"A. What do you want from me? Huh?"

Officer Jung testified that Y.D. wept after making the pretext phone calls, and it appears from the record that she wept on the stand at trial when the recording of the calls was played.

A rape crisis counselor whose testimony will be detailed below testified for the prosecution regarding rape trauma syndrome.

Defense counsel argued in his opening statement and closing argument that defendant and Y.D. had consensual sex. In the opening statement, counsel said that Y.D. claimed otherwise because she wanted and expected a continued relationship with defendant; defendant did not, so Y.D. "felt used, probably felt shunned, probably felt scorned." In closing argument, counsel addressed Y.D.'s alleged motive for lying as follows: "Some things are simply unexplainable. It's easy for the prosecutor to come up and say why would she lie? Why would she lie? Some things are unexplainable. We

might know if we could subject her to some psychological testing, but we're not allowed to. [¶] Could it be she felt guilty because she had a boyfriend and she had been flirting or courting Mr. Chan and she went over to his house and consensually had sex with him? She might. [¶] You may wonder why would she come here to court and lie again, two years later? Why wouldn't she just simply come clean now and tell the truth? I submit to you she's in too deep. She's perpetuated this lie for two years. She told a friend. She told the police. She told the nurse. She told the prosecutor. It's too late now for her to just come in and say, okay, I've been lying. She is in too deep."

The prosecutor responded in his final closing argument: "Today, the defense is saying that they don't know, that we don't know why the victim is making this up, but that's very different from the way that they started the case, telling you that the victim wanted a relationship and that she felt, quote, used, shunned, and scorned. But . . . at this point, they couldn't argue that because there was absolutely no evidence of that. [¶] We know this because [Y.D.] had absolutely no communications with the defendant after April 11th of 2006. . . . [¶] . . . [¶] She doesn't have any contact with Adamu Chan until April 27th of 2006, when she makes the pretext phone call. And when she makes that pretext phone call, this is the first time that he's heard from her. And the accusations that she makes of rape, his responses are 'No, I don't think so.' He doesn't say, 'Well, you know, would you stop calling me because, you know, I don't want a relationship with you. It was a one-night stand. Stop calling me.' [¶] No. He knows this is the first time she's called and he also knows that he's been caught."

In his opening statement, defense counsel outlined defendant's life story, stating among other things that he had been accepted to law school at U.C. Berkeley's Boalt Hall, but had moved instead to Japan, where he taught English and produced and hosted television programs. Counsel said that "the evidence will show that there is absolutely nothing, nothing in the life, the style, the person, or the spirit of Adamu Chan that would

have led him to do what he stands accused of today." However, defendant did not testify,[2] and the defense offered no evidence.

Presentation of evidence and argument in the case took approximately four full court days; the jury deliberated for approximately one full court day before rendering the verdicts.

Defendant, represented by new counsel, filed an unsuccessful motion for a new trial, advancing all of the arguments now raised on appeal.

II. DISCUSSION

A. Instruction on Belief in Consent

The court refused defendant's request to instruct the jury under CALJIC No. 10.65 "that a reasonable though mistaken belief in consent was a defense to [the charges], the so-called *Mayberry* [*People v. Mayberry* (1975) 15 Cal.3d 143] instruction." (*People v. Dominguez* (2006) 39 Cal.4th 1141, 1147.)[3]

"The *Mayberry* defense has two components, one subjective, and one objective. The subjective component asks whether the defendant honestly and in good faith, albeit mistakenly, believed that the victim consented to [the sexual activity at issue]. In order to

[2] The court ruled that, if defendant testified, he could be impeached with his 1995 robbery conviction. According to the prosecution sentencing memorandum, defendant and two accomplices in the prior case "broke into a residence, tied and held the occupants at gunpoint and robbed them. During the commission of that offense, the [d]efendant told one of the occupants that he was going to rape her as he taped her feet and hands together."

[3] The instruction reads: "In the crime of unlawful [sexual activity], criminal intent must exist at the time of the commission of the [crimes charged]. [¶] There is no criminal intent if the defendant had a reasonable and good faith belief that the other person voluntarily consented to engage in [the sexual activity]. Therefore, a reasonable and good faith belief that there was voluntary consent is a defense to such a charge . . . . [¶] However, a belief that is based upon ambiguous conduct by an alleged victim that is the product of conduct by the defendant that amounts to force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person of the alleged victim . . . is not a reasonable good faith belief. [¶] If after a consideration of all of the evidence you have a reasonable doubt that the defendant had criminal intent at the time of the accused sexual activity, you must find him . . . not guilty of the crime."

satisfy this component, a defendant must adduce evidence of the victim's equivocal conduct on the basis of which he erroneously believed there was consent. [¶] In addition, the defendant must satisfy the objective component, which asks whether the defendant's mistake regarding consent was reasonable under the circumstances. Thus, regardless of how strongly a defendant may subjectively believe a person has consented to [the sexual activity], that belief must be formed under circumstances society will tolerate as reasonable in order for the defendant to have adduced substantial evidence giving rise to a *Mayberry* instruction. [¶] . . . [¶] *[M]ayberry* . . . held that a requested instruction regarding mistake of fact was required when 'some evidence "deserving of . . . consideration" ' existed to support that contention. . . . [A] trial court must give a requested instruction only when the defense is supported by 'substantial evidence,' that is, evidence sufficient to 'deserve consideration by the jury,' not 'whenever *any* evidence is presented, no matter how weak.' " (*People v. Williams* (1992) 4 Cal.4th 354, 360-361 (*Williams*), fn. omitted & original italics.)

"To warrant a court's giving CALJIC No. 10.65, the record must contain evidence, whether direct or circumstantial, of the defendant's state of mind at the time the offense was committed." (*People v. Maury* (2003) 30 Cal.4th 342, 425 (*Maury*).) Evidence of equivocal conduct that would justify the instruction may be supplied by the victim's testimony alone. (*People v. Castillo* (1987) 193 Cal.App.3d 119, 126.) The instruction should not be given where the evidence consists of wholly divergent accounts—showing coercion on the one hand, or actual consent on the other—that "create no middle ground from which [the defendant] could argue he reasonably misinterpreted [the victim's] conduct." (*Williams, supra,* 4 Cal.4th at p. 362; see *People v. Dillon* (2009) 174 Cal.App.4th 1367, 1381-1383 (*Dillon*).)

Defendant contends that there was sufficient evidence to satisfy the subjective component of the *Mayberry* test because he twice in the recorded conversation denied raping Y.D., and he offered her a ride home after the incidents, "an action inconsistent with a realization on his part that their sexual interaction was against her will."

As for the objective component of the test, defendant argues that the following evidence, particularly when viewed as a whole, constituted sufficient equivocal conduct on the part of Y.D. to permit a reasonable belief that she consented to their sexual activity: (1) "After meeting Chan in Berkeley on April 6, 2006, [Y.D.] sent an e-mail stating that she had enjoyed meeting Chan and hoped to meet him again"; (2) "After receiving a response to her first e-mail, [Y.D.] sent another e-mail stating that she would rather meet him on a weekday than a weekend"; (3) "Chan gave [Y.D.] a ride home on April 10, 2006, i.e., the day before the incident"; (4) "On April 11, 2006, Chan met [Y.D.] at a café, after which they drove to see the sights in Berkeley"; (5) "[Y.D.] then went with Chan to the house he shared with his mother. In the living room, they looked at Chan's photos together. After Chan tried to kiss [Y.D.], she went with Chan to look at the rooms in the house, including his bedroom"; (6) "When the two later returned to his bedroom, [Y.D.] removed her own pants and underpants"; (7) "After initially having sex with [Y.D.] in the bedroom, Chan led her normally, without resistance, to the bathroom, where they continued to have sex, and again led her back to the bedroom without resistance to have sex again"; (8) "After having sex with Chan, [Y.D.] wiped his penis with a tissue, post-sexual conduct from which earlier consent could be reasonably inferred by jurors"; (9) "According to the examination of the prosecution's SART expert, the condition of [Y.D.'s] vagina was consistent with consensual sexual activity"; (10) "Of great significance, [Y.D.] testified, through the interpreter, as follows concerning the nature of her communications to Chan during the incident, specifically in the context of describing events when she removed her own pants: '[I] said I really don't want to do it, I said I want to go home, so I thought he knew it. *Even though he may not have understood my—the language*"; (11) "The pretext call established that [Y.D.] and Chan had difficulty understanding one another in both English and Japanese. Indeed, her need for a translator at trial demonstrated that she could not reliably and accurately understand, and respond to, questions in English."

We find no substantial evidence satisfying either the subjective or objective facet of the *Mayberry* defense in this case. As for the subjective element, there was no direct

evidence of defendant's state of mind because he did not take the stand and explain what he believed when he had sex with Y.D. Here, as in *Maury*, *supra*, 30 Cal.4th at page 425, "defendant offered *no* evidence showing he believed that [the victim] had consented to sexual intercourse. . . . He presented neither circumstantial evidence of his state of mind at the time of the offense nor evidence that controverted the victim's testimony regarding the circumstances of the offense." Defendant cites his denials in the pretext calls that he had raped Y.D. as circumstantial evidence of his mental state during their encounter, but those denials did not reveal whether any sexual activity took place, much less anything about defendant's state of mind during such activity. The inference defendant seeks to draw from those denials—that he reasonably, but mistakenly believed that Y.D. consented to have sex—is entirely speculative, and " 'speculation is not evidence . . .' " (*People v. Waidla* (2000) 22 Cal.4th 690, 735). Defendant's offer to drive Y.D. home after the incidents is likewise less than substantial evidence of his state of mind when the incidents transpired. He might have offered Y.D. a ride because he reasonably, but mistakenly believed that their sex had been consensual, or because he felt guilty about what he had done, or because it was raining,[4] or because he had to run an errand, or for some other reason. The offer thus sheds no significant light on what defendant may have believed about the encounter. One possible inference among many that would be equally reasonable is, again, essentially speculative.

As for the objective element, the various bits of evidence defendant cites do not alone or in combination constitute substantial evidence of equivocal conduct on the part of Y.D. that would support a *Mayberry* instruction. The first five events, which consisted of Y.D.'s e-mailing defendant, meeting him socially, accepting rides from him, and agreeing to be shown around his house after resisting his first advance, could not create any reasonable belief that she wanted to have sex with him. This conclusion follows from the discussion in *Williams*, where the victim among other things accompanied the

[4] Y.D. testified that it rained heavily that day, that it was raining when she walked home, and that the walk took 30 minutes.

defendant to a hotel room and no equivocal conduct was found. (*Williams, supra,* 4 Cal.4th at pp. 357, 363.) "The relevant inquiry under *Mayberry* . . . is whether [the defendant] believed [the victim] consented to have intercourse, not whether she consented to spend time with him. To characterize the latter circumstance alone as a basis for a reasonable and good faith but mistaken belief in consent to intercourse is . . . to 'revive the obsolete and repugnant idea that a woman loses her right to refuse sexual consent if she accompanies a man alone to a private place.' " (*Id.* at p. 363.)

Defendant notes that the results of Y.D.'s SART examination were consistent with consensual sexual activity, but that physical evidence did not prove any equivocal conduct on Y.D.'s part and did nothing to illuminate defendant's mental state when the sex occurred. Defendant cites evidence that Y.D. may have wiped his penis with a tissue after the sex was over, but only equivocal acts preceding or during the sexual activity bore on any belief he might have formed about her consent to that activity while he engaged in it.

Y.D. acknowledged removing her pants in defendant's bedroom, and letting herself be led to and from the bathroom during their sexual activity, but said that those potentially equivocal acts followed defendant's use of threats and force that made her believe resistance would be futile. *Williams, supra,* 4 Cal.4th at page 364, anticipated such a scenario, as follows: "No doubt it would offend modern sensibilities to allow a defendant to assert a claim of reasonable and good faith but mistaken belief in consent based on the victim's behavior *after* the defendant had exercised or threatened 'force, violence, duress, menace, or fear of immediate and unlawful bodily injury . . . .' [Citations.] However, a trier of fact is permitted to credit some portions of a witness's testimony, and not credit others. Since a trial judge cannot predict which evidence the jury will find credible, he or she must give the *Mayberry* instruction whenever there is substantial evidence of equivocal conduct that could be reasonably and in good faith relied on to form a mistaken belief of consent, despite the alleged temporal context in which that equivocal conduct occurred. The jury should, however, be further instructed, if appropriate, that a reasonable mistake of fact may not be found if the jury finds that

such equivocal conduct on the part of the victim was the product of 'force, violence, duress, menace, or fear of immediate and unlawful bodily injury . . . .' " (Original italics.)

Thus, defendant is correct that the coercion Y.D. said he used may not necessarily negate a *Mayberry* defense. However, defendant's argument regarding equivocal conduct overlooks Y.D.'s testimony that she was sobbing while that conduct occurred, a fact that would have precluded any reasonable belief that the conduct demonstrated consent. Defendant puts special emphasis on Y.D.'s admission that she may have used language he did not understand when she told him before taking off her pants that she was not consenting, but, here again, he fails to acknowledge that she was crying at the time. Defendant simply lifts the words we have placed in italics from the following exchange: "Q. Had you already told the defendant at that point that you did not want to have sex with him?" "A. I had been crying a long time before that and *I said I really don't want to do it and I said I want to go home, so I thought he knew it. Even though he may not have understood my—the language*, normally if a crying woman, you would think a crying woman wouldn't want to do that right. Right?" Thus, taking evidence out of its "temporal context" as permitted by *Williams, supra,* 4 Cal.4th at page 364, does not assist defendant because Y.D. never testified to any conduct at any given time that could have created a reasonable impression that she consented to have sex with him. Substantial evidence to support a *Mayberry* instruction is lacking. See discussion in *People v. Hernandez* (2009) 180 Cal.App.4th 337, 343-346.

Even if we grant that the jury might not have credited Y.D.'s testimony that she was crying when she took off her pants and let herself be led around the house, no *Mayberry* instruction was required for the following reason. If the jury did not believe Y.D. when she said that defendant made threats and used force before they had sex, or that she was crying when the sex occurred, then what she described was an entirely consensual encounter, free of conduct that would have been subject to reasonable misinterpretation. (*Williams, supra*, 4 Cal.4th at p. 362 [evidence must disclose a middle ground between coercion and actual consent]; *Dillon, supra*, 174 Cal.App.4th at pp.

1381-1383; see also *Williams, supra*, at p. 362, fn. 7 [*Mayberry* instruction is not required in every case where actual consent is claimed].)

Accordingly, given the evidence in the case, the court correctly declined to furnish the CALJIC No. 10.65 instruction.

B. Rape Trauma Syndrome

(1) Record

Marcia Blackstock testified as an expert on rape trauma syndrome and sexual assault. She had been Executive Director of Bay Area Women Against Rape, a rape crisis center in Alameda County, for 28 years. She had counseled thousands of rape victims, taught every Oakland police academy class since 1978, and trained prosecutors, health professionals, clergy, therapists, and school personnel. She had spent two weeks in Japan setting up the country's first rape crisis center. During that time, she met "a lot of Japanese sexual assault survivors," and worked with women who were organizing to provide emotional support to those victims. She estimated that she had provided expert testimony for the prosecution in 30-40 cases.

Blackstock testified that she had not met Y.D., and did not know any of the facts of the case. She did not meet with victims in cases where she testified as an expert "[b]ecause I want to come in and talk about Rape Trauma Syndrome and tell you what I know and tell you the generality of how people respond to sexual assault. If it fits with the survivor in this case, it fits. If it doesn't, it doesn't. But I'm not trying—I don't want to color my testimony to fit something so I'd rather just not know."

Blackstock stated that rape trauma syndrome has three phases: first, an "acute crisis" phase, which starts right before the rape happens and lasts from two weeks to two months thereafter, where the survivor is "very, very traumatized" and "every emotion is very extreme"; second, a "numbing or denial" phase where survivors "appear fine," but "[t]hey're not fine" and "they've pushed all the emotions out of the way"; third, an "integration or assimilation" phase, where the first phase emotions "come back very, very strong," but survivors have "more skills to deal with them . . . and then carry on with their lives."

Blackstock made the following generalizations about rape and rape victims: most rapes are perpetrated by someone the victim knows; only about 20 percent of rapes are reported; reports are almost always delayed for two hours to two weeks; victims offer different levels of resistance; victims do not necessarily take logical escape routes; and victims often have difficulty remembering specific details about the rape.

The prosecutor posed hypothetical questions to Blackstock about the behavior of rape victims. He asked whether a woman who had been threatened and assaulted by her attacker would "be more inclined to stop physically resisting during the actual rape." She answered that it would "depend[] . . . on the individual survivor and the offender. But it is very common to start fighting and to stop when you realize that's getting you nowhere except more physical injury." She said that it would not be surprising for a woman to go inside the home of someone with whom she had felt uncomfortable. She said it would not be uncommon for a woman who had been threatened to take off her own pants after her assailant had taken off her top. "At some point when you see it's going to be the final thing no matter what you've done or tried to do," she said, "it's like, okay, let's just get it over with, as a way of making it end." She said it would not be surprising if a victim being led from one part of a house to another during an assault did not try to run for the door, because the victim would be in shock and "when you're in that place, perpetrators really do take on an all-powerful position." She said that a victim testifying two years after a rape might react emotionally if she heard a tape of the perpetrator's voice. She explained that testifying victims would "try to disassociate" to cope with having to recount their ordeals, and that the "disassociation can be broken easily . . . by hearing a tape . . . that takes them immediately back into the crisis mode."

Blackstock was asked whether cultural differences led Japanese and American women to react differently to rape. Defense counsel objected, citing "lack of foundation," and the objection was overruled. Blackstock answered: "First, I want to say I don't like generalizing cultures because in every culture people respond differently to things. And people who are brought up in very patriarchal cultures or in cultures where women are outwardly taught to be more passive, where sexual assault is—Sexual assault

is a taboo in any culture, but in a lot of Asian cultures, the Japanese culture being one of them, it's particularly taboo. So the seeking out help out of your community or out of your family is really not acceptable. Telling your family is really not acceptable because it brings shame on the whole family. There's a lot of very complicated dynamics that I have witnessed in the Japanese women that I've worked with that make it very hard for them to get help." The prosecutor asked whether it would "then take more strength or courage for a Japanese woman raised in that culture to report a rape?" After another "lack of foundation" objection was overruled, Blackstock said, "I do think that there are many dynamics in that culture that make it even more difficult to report than some other cultures. It's hard for anyone to report. That's the bottom line. And you add in cultural, religious, ideologies that tell you that you really shouldn't, and that really takes a lot more courage to walk through that and talk to somebody about it."

Blackstock was asked on cross-examination, "And it is true, is it not, that regrettably people sometimes don't tell the truth about these kinds of accusations; correct?" She answered, "That is true. And if you look at false reporting rates for all crimes, the FBI says for felony crimes there's a five to 10 percent false reporting rate. For the crime of rape, they say there's two to three percent. So out of a hundred people, maybe two or three people that lie."

(2) Review

Defendant asserts a number of arguments in connection with Blackstock's testimony: (1) she impermissibly testified in detail about rape trauma syndrome (*People v. Bowker* (1988) 203 Cal.App.3d 385, 392, fn. 8 ["[d]etailed testimony describing [child sexual abuse accommodation] syndrome itself is neither relevant nor necessary"], see *id.* at pp. 389, 394 [expert whose testimony "accounted for nearly 70 pages of reporter's transcript" discussed syndrome "at great length," explaining each of the stages "in detail"]; (2) she impermissibly answered hypothetical questions based on the specific facts of this case (*People v. Jeff* (1988) 204 Cal.App.3d 309, 339 [prosecutor "should not have been allowed to ask supposed hypothetical questions of [the expert], framed upon the facts testified to by [other witnesses]"]); (3) she impermissibly referred to rape

victims as rape "survivors"; (4) she was unqualified to testify about Japanese cultural attitudes; (5) the court erroneously failed to instruct the jury pursuant to CALJIC No. 10.64 ("Cautionary Instruction—Child Abuse/Rape Trauma Syndrome")[5] that her testimony should not be taken as proof of the truth of Y.D.'s allegations (*People v. Housley* (1992) 6 Cal.App.4th 947, 958-959 (*Housley*) [court has a sua sponte duty to give this limiting instruction]).

The first three of these arguments were forfeited by defendant's failure to object at trial to the testimony in question. (Evid. Code, § 353.) "In the absence of a timely and specific objection on the ground sought to be urged on appeal, the trial court's rulings on admissibility of evidence will not be reviewed." (*People v. Clark* (1992) 3 Cal.4th 41, 125-126.)[6] Aside from the foundational objections defendant raised to questions Blackstock was asked about Japanese rape victims, defendant did not object to any of the

[5] This instruction states: "Evidence has been presented to you concerning . . . [rape-trauma] syndrome. This evidence is not received and must not be considered by you as proof that the alleged victim's . . . [rape] claim is true. [¶] [[R]ape trauma] syndrome research is based upon an approach that is completely different from that which you must take to this case. The syndrome research begins with the assumption that a [rape] has occurred, and seeks to describe and explain common reactions of [females] to that experience. As distinguished from that research approach, you are to presume the defendant innocent. The People have the burden of proving guilt beyond a reasonable doubt.] [¶] You should consider the evidence concerning the syndrome and its effect only for the limited purpose of showing, if it does, that the alleged victim's reactions, as demonstrated by the evidence, are not inconsistent with [her] having been [raped]." (See *People v. Bledsoe* (1984) 36 Cal.3d 236 [rape trauma syndrome evidence admissible to dispel common misconceptions about how such victims behave (*id.* at pp. 247-248), but not to prove that victim has actually been raped (*id.* at p. 251)].)

[6] Defendant suggests that the arguments were preserved because he raised them in the motion for new trial, but his objections were untimely at that stage. (See *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 76 (*Coffman*) [defendant forfeited argument that evidence was erroneously admitted by failing to make a "contemporaneous" objection].) Defendant observes that, in denying the new trial motion, the court stated that Blackstock merely "gave the type of testimony that rape trauma experts always give," but this remark about the "type" of testimony in question does not demonstrate that objections to specific parts of it would have been futile.

hypothetical questions about rape victims' behavior, including the question about the voice of the perpetrator triggering an emotional reaction.

Defendant contends that Blackstock was "utterly unqualified to answer" the questions about Japanese rape victims. Defendant submits that Blackstock should have been barred from opining "as to the delicate internal processes of members of a culture she knows nothing about, whose language she does not speak, and whose country she once visited for a period of two weeks." However, "[t]he qualification of expert witnesses, including foundational requirements, rests in the sound discretion of the trial court. [Citations.] That discretion is necessarily broad . . . . [Citation.] Absent a manifest abuse, the court's determination will not be disturbed on appeal. [Citations.]" (*People v. Ramos* (1997) 15 Cal.4th 1133, 1175; see also *People v. Harlan* (1990) 222 Cal.App.3d 439, 448 [trial court has wide discretion to determine whether witness qualifies as an expert; clear abuse of discretion must be shown].) We find no abuse of the court's considerable discretion here. Although Blackstock visited Japan briefly, she said that, during that time as she set up Japan's first rape crisis center, she met many rape victims and worked with those trying to support them. The court could reasonably decide that Blackstock was qualified to opine about Japanese rape victims based on her focused experience in the country. The weight to which the testimony was entitled, given the limited nature of that experience, was a matter for argument and for the jury to determine.

As for the instructional issue, we will assume for purposes of this opinion that the *Housley* case was correct in holding that a limiting instruction on the use of syndrome evidence is required sua sponte. (But see Evid. Code, § 355 [where evidence is admissible for one purpose and not another, court "upon request" shall so instruct the jury]; *People v. Humphrey* (1996) 13 Cal.4th 1073, 1088, fn. 5 [if prosecution offered battered women's syndrome evidence, limiting instruction might be appropriate "on request"; *Housley, supra,* 6 Cal.App.4th at p. 957 [acknowledging cases holding that the instruction is required "only where one is requested"].) The issue, then, is whether the failure to give the instruction was prejudicial under the *Watson* standard. (*People v. Watson* (1956) 46 Cal.2d 818, 836 [different result reasonably probable]; see *People v.*

Bunyard (1988) 45 Cal.3d 1189, 1224 [discussing reasonable probability of different result if limiting instruction had been given]; *Housley*, *supra*, at p. 959 [same].)

We conclude that it was not for the following reasons. The situation here is the same as in *Housley*, *supra*, 6 Cal.App.4th at page 959, where the expert "told the jury she had not met the victim and had no knowledge of the case. Her testimony was couched in general terms, and described behavior common to abused victims as a class, rather than any individual victim. In the face of this testimony, it is unlikely the jury interpreted her statements as support for [the victim's] credibility." Our conclusion is also supported by the decision in *Bowker*, *supra*, 203 Cal.App.3d 385, where the expert's syndrome testimony went on for 70 pages of transcript, was determined to have been excessively detailed, but was nonetheless deemed not to have been "a critical factor in establishing [the defendant's] guilt" (*id.* at p. 395). Blackstock's testimony was far briefer and less detailed than that of the expert in *Bowker*. We have set forth most of her testimony on direct examination, and the whole of her testimony is contained in only 16 pages of transcript. Moreover, the prosecutor made virtually no reference to her testimony in jury arguments, mentioning only, in his initial closing argument, that Blackstock had "testified that only about two or three out of every 10 rapes are reported, and that's because of all of the emotions that are brought up with the victims in the case and it's a difficult crime to report." For these reasons, it is not reasonably probable that the verdicts would have been different if a limiting instruction had been given with respect to Blackstock's testimony.[7]

C. Vouching for Y.D.'s Credibility

(1) Record

The prosecutor asked Officer Jung to describe Y.D's demeanor when she came to the police department on April 27, 2006 for the photo lineup and phone call. A defense

[7] For these same reasons, defendant has no viable ineffective assistance of counsel claim arising from the failures to object to allegedly improper syndrome evidence. (*People v. Fosselman* (1983) 33 Cal.3d 572, 584 [different result must be reasonably probable absent counsel's failings].)

"lack of foundation" argument was overruled, and Jung said that Y.D. was "definitely distraught. You could tell she was nervous, scared. The assault was definitely still weighing on her mind." Jung started to add, "In fact, her friend, the translator that came with her, said she was—" when defense counsel interposed a hearsay objection. The court sustained the objection, defense counsel said, "I would ask that it be stricken," the court responded, "She [Jung] didn't say anything," and the questioning continued. The prosecutor asked Jung to describe Y.D.'s "physical condition" when Jung first met her, and Jung said, "Again she appeared nervous. And it wasn't until after she made the phone calls that she broke down and was crying." When asked how Y.D. reacted when Jung asked her to make the pretext phone call, Jung said, "She hesitated. She was scared. She didn't want to hear his voice again." Y.D. "kept herself composed" during the call, but Jung "knew she was still nervous and scared."

On cross-examination, Jung acknowledged that people sometimes make false accusations in sexual assault cases. On redirect examination, she was asked whether anything about her interaction with Y.D. led her to believe that she was making a false accusation. Defense counsel objected that the question called for speculation, the objection was overruled, and Jung answered, "No. She genuinely looked frightened, distraught. It didn't appear that she was making something up." On further cross-examination, Jung confirmed that her assessment of Y.D.'s credibility was based solely on the hour she had spent with her two years before trial.

The prosecutor asked Officer Shannon to describe Y.D.'s demeanor when he met her at S.F. General Hospital and she reported having been raped. Shannon said that Y.D. appeared "a little bit . . . shocked," "a little stunned and very quiet." The prosecutor asked him to describe Y.D.'s demeanor when he interviewed her at Highland Hospital, and he said that she was quiet and "intermittently tearful." She "tended to look down a lot," and "became quite upset" at one point when, Shannon said, "it seemed to me she was having a hard time looking at me while talking about it." When the prosecutor asked Shannon whether Y.D.'s demeanor was consistent with that of other rape victims he had

interviewed, defense counsel objected on grounds of relevance and lack of expertise. The objection was overruled, and Shannon answered, "Yes, it was."

On cross-examination, Shannon said that he knew of cases in which sex crimes were falsely alleged, but when asked whether he believed what Y.D. told him, he said, "I did." On redirect examination, Shannon said that nothing in his seven or eight hours of interactions with Y.D. led him to believe that she was making any false accusations.

Defendant unsuccessfully moved for a mistrial on the ground that Shannon should not have been allowed to opine that Y.D. was telling the truth.

The prosecutor asked SART examiner Majarian: "After considering the injuries that you observed on [Y.D.], were they consistent with injuries that are seen amongst victims of rape or sexual assault?" Defense counsel objected, "[C]alls for speculation. And this is a decision that the jury makes." The court overruled the objection, adding, "She may testify as to her expert opinion, but the jury makes the findings." Majarian said, "Yes, I do find these findings consistent with her history of sexual assault given that she had erythema and bruising of her cervix and that she had bruising on her left arm which are consistent with her history."

(2) Review

Witnesses are generally precluded from vouching for the credibility of others. (*Coffman, supra,* 34 Cal.4th at p. 82 ["[t]he general rule is that an expert may not give an opinion whether a witness is telling the truth"] *People v. Melton* (1988) 44 Cal.3d 713, 744 (*Melton*) ["[l]ay opinion about the veracity of particular statements by another is inadmissible on that issue"].) Defendant argues that testimony given by Jung, Shannon, and Majarian violated this rule.

Majarian's testimony that Y.D.'s injuries were consistent with the history Y.D. provided was proper expert testimony on a specialized subject (Evid. Code, § 801), not an improper opinion concerning Y.D.'s credibility. Majarian's cross-examination confirmed that she accepted Y.D.'s report at face value without passing judgment on its veracity.

Defendant objected to Shannon's statement that Y.D.'s demeanor was consistent with that of other rape victims, and to his testimony and that of Jung that nothing in their interactions with Y.D. suggested that she was making false allegations. However, unlike the statement that defendant elicited from Shannon on cross-examination that he believed Y.D.'s story, the statements elicited by the prosecution fell short of opinions that she was telling the truth; Jung and Shannon were only saying that they had no reason to doubt her. Moreover, defendant opened the door to all of the challenged testimony by getting Jung, who testified before Shannon, to acknowledge that false accusations of sexual assault do occur. (*People v. Cleveland* (2004) 32 Cal.4th 704, 746 [redirect examination may be undertaken ". . . 'to explain or rebut adverse testimony or inferences developed on cross-examination' . . ."]; *People v. Wharton* (1991) 53 Cal.3d 522, 595 ["the prosecutor was allowed to explore implications raised by defendant"].) Accordingly, the court did not err in allowing the challenged testimony.

Any error in admitting the evidence would have been harmless in any event, for a number of reasons. First, evidence suggesting that Jung and Shannon believed Y.D.'s report "did not present any evidence to the jury that it would not have already inferred from the fact that [they] had investigated the case and that defendant had been charged with the crimes." (*People v. Riggs* (2008) 44 Cal.4th 248, 300.) Second, most of the testimony from Jung and Shannon pertaining to Y.D.'s credibility consisted of permissible observations about her demeanor. (*People v. Chatman* (2006) 38 Cal.4th 344, 397 ["a witness may testify about objective behavior and describe behavior as being consistent with a state of mind"].) As to the credibility issue, any "further implication" created by the challenged statements was "minimal in context." (*Melton*, *supra*, 44 Cal.3d at p. 745.) Third, the prosecution did not exploit any of the challenged statements in jury arguments. (*Ibid.*) Fourth, the jury was instructed in accordance with CALJIC Nos. 2.20 and 2.81 that it was the sole judge of the credibility of witnesses, and that it was free to reject the opinion testimony of lay witnesses. (See *Coffman*, *supra*, 34 Cal.4th at p. 83 [factoring such standard instructions into calculus of prejudice].) Fifth, it is likely that the jury's assessment of Y.D.'s credibility turned on her trial testimony,

which included a thorough cross-examination, rather than on opinions Jung or Shannon formed on that subject from their pretrial contacts with her. Thus, it is not reasonably probable that the challenged testimony affected the outcome. (See *Melton*, *supra*, at p. 745 [applying *Watson*].)

D. Interpreter Issues

(1) Record

Defendant raised two issues in his new trial motion in connection with interpreter Minoura. First, he argued that use of Minoura as an interpreter at trial violated standards in the California Rules of Court and the National Association of Judiciary Interpreters and Translators (NAJIT) Code of Ethics concerning impartiality and conflicts of interest.[8] Defendant lodged declarations from people who attended the trial stating that they had seen Minoura accompanying the prosecutor, Y.D., and Y.D.'s friend Sasaki "before and after entering the courtroom and also convers[ing] with them during recess in the side chambers behind closed doors." Defendant maintained that "[h]aving assisted or advised the prosecution in the preparation and presentation of its case, Ms. Minoura had a conflict of interest that barred her from serving as [the court's] official court interpreter."

[8] California Rules of Court, rule 2.890(c) provides: (1) "Impartiality. An interpreter must be impartial and unbiased and must refrain from conduct that may give an appearance of bias. (2) Disclosure of conflicts. An interpreter must disclose to the judge and to all parties any actual or apparent conflict of interest. Any condition that interferes with the objectivity of an interpreter is a conflict of interest. A conflict may exist if the interpreter is acquainted with or related to any witness or party to the action or if the interpreter has an interest in the outcome of the case. (3) Conduct. An interpreter must not engage in conduct creating the appearance of bias, prejudice, or partiality."

Canon 2 of the NAJIT Code of Ethics reads: "Impartiality and Conflicts of Interest. Court interpreters and translators are to remain impartial and neutral in proceedings where they serve, and must maintain the appearance of impartiality and neutrality, avoiding unnecessary contact with the parties. Court interpreters and translators shall abstain from comment on matters in which they serve. Any real or potential conflict of interest shall be immediately disclosed to the Court and all parties as soon as the interpreter or translator becomes aware of such conflict of interest." (<http://www.najit.org/ethics.html> [as of Mar. 31, 2010].)

Second, defendant argued that Minoura should not have been called upon to translate the Japanese portions of the pretext calls while the recording of the calls was played in court. This argument was based on the NAJIT's belief that "simultaneous interpreting of a recording in the courtroom is usually an impossible task that should not be ordered by a court, nor attempted by an interpreter." (NAJIT Position Paper, Onsite Simultaneous Interpretation of a Sound File is Not Recommended. (<http://www.najit.org/documents/Onsite%20Simultaneous%20Interpre.pdf> [as of Mar. 31, 2010].) To insure accuracy, the NAJIT advocates preparation of "a transcribed and translated text," rather than "on the spot" translation. (*Ibid.*) "The proper procedure," defendant submitted, "would have been for the prosecution to prepare a translation of the Japanese portions of the tape prior to trial, to make that transcript available to the defense, and to put Ms. Minoura on the stand to testify as an expert witness, and be subjected to cross-examination, on its contents." Defendant submitted declarations from three Japanese speakers offering alternative translations of the recorded calls, showing what he alleged were prejudicial omissions from the translation Minoura provided.[9]

The prosecutor argued at the hearing on the motion that the defense had failed to establish that it was "improper for me to communicate with any of my witnesses through

[9] Minoura translated one of the exchanges between Y.D. (questioning in Japanese) and defendant (answering in English) as follows: "Q. Because I don't want to do it. I didn't want to do it. I was crying really. A. Yeah." Two of defendant's translators said that Y.D. mentioned teaching something to defendant, which he thought made his agreement appear less damaging. According to one of the translations, Y.D. said, "Because I don't want to do. I didn't want to do. I was crying, really. OK then, hello? [¶] . . . [¶] I'll teach you something; in general . . . hello?" According to another of the translations, Y.D. said, "I really did not want to sex. I was crying. I will teach you. It was rape that you had sex with woman who was crying, screaming and wanted to go home. It was rape, wasn't it? Hello." Minoura could not make out what Y.D. said at another point in the conversation before defendant responded, "Do you want me to say sorry?" Defendant's translators had Y.D. saying at that point that she was going to hang up. Defendant thought that his "seeming admission of responsibility" took on "a very different cast" as a response to Y.D.'s "frustrated threat" to hang up the phone.

the use of the same interpreter that was used in court." The prosecutor represented that Minoura's "role in this case, whether in court or between the witnesses and I, was solely to interpret. . . . She did not advise me or any of the witness[es] in this case."

(2) Review

Defendant's arguments involving the interpreter provide no grounds for reversal of the judgment.

The arguments were forfeited because they were not raised during trial. *People v. Aranda* (1986) 186 Cal.App.3d 230, 237 observed: "When a showing is made, at trial, that an interpreter may be biased or his skill deficient, one solution may be appointment of a 'check interpreter.' [Citation.] When no objection is raised to the competence of the interpreter during trial, the issue cannot be raised on appeal. [Citations.]" *People v. Aranda* was cited with approval in *People v. Romero* (2008) 44 Cal.4th 386, 404, 411 (*Romero*), where the defendant claimed that unreported discussions between interpreters and witnesses at trial violated his right under California Rules of Court, rule 2.890(b) to a complete and accurate interpretation of the testimony. The defendant was held to have forfeited that argument by failing to raise it at trial: " ' "[A]s a general rule, 'the failure to object to errors committed at trial relieves the reviewing court of the obligation to consider those errors on appeal.' . . ." ' [W]e see no reason why the general rule of forfeiture should not be applied to violations of rules of court or to claims of error relating to interpreters for the witnesses." (*Romero, supra*, 44 Cal.4th at p. 411.)

The same result obtains here with respect to the alleged violations of California Rules of Court, rule 2.890(c), and the tenets of the NAJIT. Nothing prevented defendant from requesting a written transcript of the translated portions of the pretext call if he felt one was necessary. Defendant asserts that he had no reason to object to having Minoura act as the interpreter at trial because he and his trial counsel were unaware of the out of court interactions between her, the prosecutor, and witnesses that others who attended the trial observed. However, no evidence in the record substantiates that claim of ignorance.

The arguments would fail even if they had been preserved. Defendant cites no authority that accords NAJIT ethical canons or position papers the force of law. As for

violation of California Rules of Court, rule 2.890(c), the most the record could be said to establish was a possible appearance of bias given Minoura's assistance to the prosecutor, not that she had any actual bias or conflict of interest that might have deprived defendant of a fair trial. The record does not demonstrate how the defendant was prejudiced by the interpreter's interaction with the witnesses. There is no suggestion in the record that the interpreter or the prosecutor through the interpreter influenced the witnesses to testify in a certain way.

III. DISPOSITION

The judgment is affirmed.

_____
Marchiano, P.J.

We concur:

_____
Margulies, J.

_____
Banke, J.